No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CHRISTINE MCKENNON,

Petitioner,

v.

NASHVILLE BANNER PUBLISHING CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employee who is dismissed in violation of the Age Discrimination in Employment Act is barred from obtaining any remedy if, solely as a result of the unlawful dismissal and the litigation challenging it, the employer discovers another basis for dismissal, a question previously accepted for review by the Court in *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. granted*, ___ U.S. ___, 125 L.Ed.2d 686, *cert. dismissed*, 125 L.Ed.2d 773 (1993)

PARTIES

All of the parties who participated below are set out in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Christine McKennon respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 15, 1993.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 9 F.3d 539, and is set out at pp. 1a-9a of the Appendix hereto ("App."). The opinion of the United States District Court for the Middle District of Tennessee, Nashville Division, is reported at 797 F.Supp. 604, and is set out at pp. 10a-18a of the Appendix.

JURISDICTION

The decision of the Sixth Circuit was entered on November 15, 1993. An extension of time until March 30, 1994, for filing this petition was granted by Justice Stevens.[1] Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, which provides in pertinent part as follows:

> **§ 623. Prohibition of age discrimination**
>
> **(a) Employer practices.** It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this [Act].

[1]Docket Number 93-300635.

STATEMENT OF THE CASE

A. The Proceedings Below

This action was filed by petitioner, Christine McKennon, in the United States District Court for the Middle District of Tennessee on May 6, 1991. The complaint alleges that Ms. McKennon was discharged from her employment because of her age, in violation of the Age Discrimination in Employment Act [ADEA], 29 U.S.C. § 621, *et seq.*, and the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101, *et seq.* App. 11a.

Following discovery, the defendant, Nashville Banner Publishing Co., respondent here, filed a motion for summary judgment based on evidence obtained during discovery. App. 12a. For the purpose of the motion, the defendant and the courts below assumed that petitioner had been the victim of age discrimination in violation of the ADEA. App. 3a.

The district court granted the motion based on the "after-acquired evidence" doctrine that governs in the Sixth Circuit. Petitioner was precluded from any recovery, even if she had in fact been subjected to age discrimination. The court rejected petitioner's argument she should be given a chance to establish at trial that her copying and removing documents was not such misconduct as to justify her termination.

On appeal, the Sixth Circuit affirmed, rejecting arguments that the "after-acquired evidence" doctrine should not be applied in cases (1) where the alleged misconduct only happened because of the employer's discriminatory action and (2) where the alleged misconduct occurred during employment rather than where there was employment application fraud. In its decision, the Sixth Circuit specifically relied upon its earlier decision in *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir.

1992), *cert. granted*, ___ U.S. ___, 125 L.Ed.2d 686, *cert. dismissed*, 125 L.Ed.2d 773 (1993). This petition for a writ of certiorari follows.

B. Statement of Facts

Since the district court granted summary judgment in favor of the defendant, the facts below must be viewed in the light most favorable to the plaintiff. Petitioner was employed by respondent since May, 1951, and held a variety of positions. At all times, her performance was consistently rated as excellent. Her employment was terminated on October 31, 1990, when she was sixty-two years old. App. 10a-11a.

For more than a year prior to her termination, petitioner began to experience a pattern of conduct designed to force her resignation and/or retirement. For example, petitioner's parking privileges were altered, her lunch hour privileges modified, and she was denied an appropriate pay raise. Furthermore, the newspaper's Comptroller (petitioner's immediate supervisor) began to suggest retirement. Petitioner was informed that the newspaper's finances were precarious and terminations were necessary and imminent.

In April, 1990, the Comptroller informed petitioner that the Publisher had requested a memorandum regarding petitioner's "retirement plans." Petitioner responded to the Comptroller that she did not seek retirement and was not interested in retirement options. Nevertheless, the Comptroller independently made written inquiry to the newspaper's pension administrators, and presented the information to petitioner.

Shortly thereafter, petitioner, certain she was going to lose her job, took certain documents[2] home and shared them with her husband of thirty-six years. Petitioner did not share the information with any individual other than husband. Several months later, on October 31, 1990, petitioner was summarily terminated, without notice. The only explanation given for her termination was "staff reduction."[3]

During the course of petitioner's deposition on December 18, 1991, after suit was filed, she admitted to copying the documents, removing the documents from the company's premises, and sharing the information with her husband. Petitioner claimed that she had copied and removed the documents because of her concern that she was going to be terminated and she wanted them "in an attempt to learn information regarding my job security concerns." App. 12a.

On December 20, 1991, the company sent her a post-termination letter of termination allegedly based on the discovery that she had copied and removed these documents. App. 12a. Petitioner disputed that her copying and removal of the documents constituted such misconduct that would justify application of the after-acquired evidence defense. She also urged that her actions were justified for her own protection. Therefore, she argued, these questions should be left to the jury. App. 12a-13a.

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[2]The documents were one executive employment-severance agreement and four pages of newspaper financial information. All of this information was maintained or possessed by petitioner in the normal course of her job. Thus, the information was already known to her. Therefore, the alleged wrongful conduct was removing the documents and sharing the information with her husband.

[3]The staff reduction included the termination of the two oldest secretaries. Two days before, on October 29, 1990, the Banner hired a 26-year-old secretary.

The district court, however, held that these questions were not material; rather, it found that petitioner's copying and removal of the confidential documents constituted misconduct in violation of her obligations as a confidential secretary. App. 13a. The court further found, based solely on conclusory affidavits from four management employees[4] of the company, that petitioner would have been terminated from employment had her misconduct been learned of at any time prior to her discharge on October 31, 1990. App. 16a. The court also held that the copying and removal of the documents was not conduct protected by 29 U.S.C. § 623(d), the "opposition clause" of the ADEA.[5] The Court of Appeals affirmed, based on its prior decisions applying the "after-acquired evidence" doctrine.

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[4]The record shows that the affidavits were all drafted by the Banner's attorney. When the publisher executed his affidavit he had not reviewed petitioner's 38 year-long personnel file and did not know what documents she had copied. Furthermore, the respondent introduced no evidence of a company rule that prohibited petitioner's conduct, or that anyone else had ever been terminated for a similar infraction.

[5]29 U.S.C. § 623(d) provides:

> **(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation.** It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this [Act].

REASONS FOR GRANTING THE WRIT

THIS CASE RAISES AN IMPORTANT ISSUE REGARDING THE INTERPRETATION OF THE ANTI-DISCRIMINATION IN EMPLOYMENT STATUTES CONCERNING WHICH THERE IS A CONFLICT BETWEEN THE CIRCUITS.

This case presents precisely the same issue on which this Court granted certiorari in the case of *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. granted*, ___ U.S. ___, 125 L.Ed.2d 686, *cert. dismissed*, 125 L.Ed.2d 773 (1993). Certiorari was dismissed in that case solely because the parties reached a settlement. The issue presented in *Milligan-Jensen* and the present case remains a recurrent and vitally important question about which the circuits are irreconcilably in conflict.[6]

The "after-acquired evidence" doctrine deals with evidence that the employer discovers after the challenged employment decision was made, and which the employer alleges would (if known) provide a non-discriminatory basis for adverse employment action. The evidence is usually, as in this case, discovered only as a direct result of the filing of a claim of employment discrimination. Some circuits have held that "after-acquired evidence" totally bars the

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[6]The instant case presents facts that are arguably more compelling than *Milligan-Jensen*. *First*, here the wrongful conduct was caused by the discrimination and petitioner's efforts to protect herself from it. *Second*, *Milligan-Jensen* involved application fraud where the employer could argue that the employee was not qualified for the job and would never had been hired pursuant to neutral and objective criteria. The instant case involves nearly forty years of employment by a qualified and excellent employee. Yet, the employer is allowed to avoid liability by essentially a discretionary, post-litigation decision to terminate.

employee's claim. That is, it defeats any liability and all relief under the statute. Other circuits, however, have held that such evidence is relevant only in determining whether the relief for the employer's discriminatory action should be limited in that reinstatement would be inappropriate or back pay cut off.

The Sixth and the Tenth Circuits have held that after-acquired evidence is a basis for absolving an employer of any liability for discriminatory practices. *Summers v. State Farm Insurance*, 864 F.2d 700 (10th Cir. 1988);[7] *Milligan-Jensen v. Michigan Technological Univ.*, *supra*.[8] The present case applies the Sixth Circuit's "after-acquired evidence" doctrine to an action brought under the ADEA.

The Eleventh Circuit, on the other hand, has held that an employer is liable under the same circumstances. *Wallace v. Dunn Construction Co.*, 968 F.2d 1174 (11th Cir. 1992). *Wallace* expressly rejected the reasoning of the Tenth Circuit,[9] and held that an employer may escape a finding of liability only by showing that it had relied on a nondiscriminatory reason at the time of the employment decision, citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). 968 F.2d at 1180-81. Thus, "after-acquired evidence" cannot defeat *liability*, but may limit the relief available in

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[7]". . . while such after-acquired evidence cannot be said to have been a 'cause' for Summers' discharge in 1982, it is relevant to Summers' claim of 'injury' and does itself preclude the grant of any present relief or remedy to Summers." 864 F.2d at 708.

[8]"This circuit . . . has committed itself to the *Summers* rule. . . . . [I]f the plaintiff would not have been hired, or would have been fired, if the employer had known of the falsification, the plaintiff suffered no legal damage by being fired." 975 F.2d at 304-05.

[9]". . . we reject the *Summers* rule that after-acquired evidence may effectively provide an affirmative defense to Title VII liability." 968 F.2d at 1181.

that reinstatement may be precluded and backpay available only to the date that the employer demonstrates that the new evidence would have been discovered in the absence of the litigation. 968 at 1182-83.

The Seventh Circuit has taken a third and intermediate position on this issue. Thus, newly discovered evidence that shows that the employee had made misrepresentations on his or her employment application will not defeat liability unless the misrepresentation is related to a critical job element. Further, in the Seventh Circuit back pay is cut off as of the date the after-acquired evidence was in fact discovered. *Kristufek v. Hussmenn Foodservice Co.*, 985 F.2d 364, 369-70 (7th Cir. 1993).

As the United States and the Equal Employment Opportunity Commission pointed out in their brief as amici curiae in support of the grant of certiorari in *Milligan-Jensen*, there has been a proliferation of cases "in which employers offer 'after-acquired evidence' to defend their discriminatory actions" and that the defense has "broadly destructive impact . . . on nondiscrimination goals." Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae in No. 92-1214, p. 11, citing, *inter alia*, the present case as one of "many recent cases in which the 'after-acquired evidence' defense has been raised." *Id.*, n.4.[10]

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[10]The issue is currently pending in the Fourth Circuit in *Russell v. Microdyne Corp.*, 830 F. Supp. 305 (E.D. Va. 1993), appeal pending Nos. 93-1895 & 93-2078 and in the Ninth Circuit in *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F. Supp. 1466 (D. Ariz. 1992), appeal pending No. 92-15625. District courts in the Fifth Circuit have adopted the no recovery rule of the Sixth and Tenth Circuits. *See, e.g., Redd v. Fisher Controls*, 814 F. Supp. 547 (W.D. Tex. 1992). District courts in the Second and Third Circuits, on the other hand, have rejected *Summers* and have followed the Eleventh Circuit's decision in *Wallace*. *See, e.g., Moodie v. Federal Reserve Bank of New York*, 831 F. Supp. 333 (S.D.N.Y. 1993); *Massey v. Trump's Castle*

The impact of the "after-acquired evidence" doctrine on the rights of Title VII and ADEA claimants can be significant because of the manner in which the lower courts have generally enforced the doctrine. For example, if the Banner had discovered Ms. McKennon's allegedly wrongful conduct before October 31, 1990, and had fired her for removing the documents, then she could have filed an ADEA claim, alleged that the Banner's reason was a pretext for age discrimination, and had a jury trial on the issue. In the typical "after-acquired evidence" case, however, the employer can avoid the jury and obtain summary judgment with self-serving affidavits supporting a post-litigation termination. This result subverts this Court's decision in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), which depends on plaintiffs having "a full and fair opportunity to demonstrate pretext." 450 U.S. at 256. Such a result is not justified, since both situations present equally difficult questions of fact that deserve full exploration.

In addition, the importance of the issue is demonstrated by this Court's recent decision in *ABF Freight System, Inc. v. National Labor Relations Board*, 510 U.S. ___, 127 L.Ed.2d 152 (1994), which deals with a related question. There, this Court upheld the NLRB's discretion to grant full relief for a violation of the National Labor Relations Act even though the employee had given a false reason for being late to work and had repeated that falsehood in testimony under oath in a formal proceeding before a NLRB Administrative Law Judge. There has been substantial dispute and speculation as to the impact and relevance of the decision in *ABF Freight System* to the "after-acquired evidence" issue in employment discrimination cases. *See* "Attorneys Still Looking for Answers on Effect of Misconduct in Bias Cases," 2 *BNA Employment Discrimination Report*, p. 273 (March 2, 1994).

Hotel & Casino, 828 F. Supp. 314 (D.N.J. 1993).

Petitioner urges that the approach of the Eleventh Circuit is correct and should be adopted by this Court. "After-acquired evidence" cannot absolve an employer of discriminatory action, although it may affect the remedy to be granted the employee. This rule would be consistent with the decision of this Court in *Price Waterhouse v. Hopkins*, *supra*, and with section 107 of the Civil Rights Act of 1991, which provides that if a reason for an employment decision violates Title VII, then there is liability under the statute; only the remedy is affected if there is another, legal reason for the action. As the United States has pointed out, the "after-acquired evidence" doctrine of the Sixth and Tenth Circuits, as applied in this case, is "an unwarranted obstruction to proper and effective enforcement of the nondiscrimination requirements" of the civil rights statutes, and should be rejected.[11]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

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[11]Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae in No. 92-1214, p. 11-12.

Respectfully submitted,

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APPENDIX

No. 92-5917

United States Court of Appeals,
Sixth Circuit

CHRISTINE McKENNON,

Plaintiff-Appellant,

v.

NASHVILLE BANNER PUBLISHING COMPANY,

Defendant-Appellee.

Decided Nov. 15, 1993

Before: KENNEDY and RYAN, Circuit Judges; and BROWN, Senior Circuit Judge.

BAILEY BROWN, Senior Circuit Judge

In this age discrimination suit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, the plaintiff, Christine McKennon, appeals the district court's grant of summary judgment in favor of defendant Nashville Banner Publishing Co. ("the Nashville Banner" or "the Banner"). The Equal Employment Opportunity Commission filed an *amicus curiae* brief in support of Mrs. McKennon, and the Equal Employment Advisory Council filed one in support of the Nashville banner.

The plaintiff claims that the Nashville Banner violated her rights by discharging her at the age of sixty-two on the basis of age and that the district court misapplied the "after-acquired evidence" doctrine by allowing evidence of

certain misconduct during her employment, discovered by the Banner *after* her termination, to negate her claim. *See McKennon v. Nashville Banner Publishing Co.* 797 F.Supp. 604 (M.D. Tenn. 1992). Because we determine the district court properly applied the after-acquired evidence doctrine to the facts of this case, we AFFIRM the district court's grant of summary judgment.

I

The Nashville Banner employed Mrs. McKennon from May 1951 to October 31, 1990, when she was terminated. Mrs. McKennon worked primarily as a secretary, and over the years the company consistently evaluated her work performance as excellent. On May 6, 1991, Mrs. McKennon field suit claiming age discrimination. While deposing her in December 1991, the Nashville Banner discovered Mrs. McKennon had, while employed as secretary to the Comptroller, Ms. Stoneking, copied and removed from the newspaper's premises several confidential documents to which she had access as such secretary. She took the documents home and showed them to her husband.[1] Mrs McKennon asserted she copied the documents "in an attempt to learn information regarding my job security concerns" and for her "insurance" and "protection." As a result, the Banner sent Mrs. McKennon a "termination letter" in December 1991, asserting it would have terminated her immediately during her employment if it had known of her acts. It is undisputed, from the testimony of Banner executives, that the Banner would have discharged Mrs. McKennon when she took and copied the

[1] The documents included: Nashville Banner Fiscal period Payroll Ledger dated 9/30/89; Nashville Banner Publishing Co., Inc., Profit and Loss Statement dated 10/30/89; a note from Elise McMillan to Simpkins; a memorandum from Imogene Stoneking to Irby C. Simpkins, Jr., dated 2/3/89; a handwritten note dated 2/8; and an Agreement between the Banner and one of its managing employees, notarized 3/1/89.

records if it had then known that she had done so.

The Banner's summary judgment motion assumed, for purposes of the motion, that it would be liable to Mrs. McKennon under the ADEA in discharging her for age discrimination[2] but for the undisputed fact that, before she was discharged, Mrs McKennon was guilty of conduct which, if known by the Banner, would have caused her discharge.[3] The district court, in granting summary judgment, agreed with this proposition. It determined that, because it was undisputed that Mrs. McKennon was guilty of misconduct, prior to her discharge, that would, if known by the Banner, have caused her discharge, the Banner was entitled to summary judgment. The district court concluded that this result must follow because Mrs. McKennon did not suffer injury from the claimed violation. *McKennon*, 797 F.Supp. at 608.

Mrs. McKennon contends on appeal that the after-acquired evidence rule should not apply to defeat her age discrimination claim. She argues that her situation is distinct from other cases involving after-acquired evidence because her action concerns employee misconduct during employment rather than employment application fraud and also because a nexus exists between her wrongful conduct

[2] The summary judgment record contains substantial deposition testimony of Mrs. McKennon that she was indeed discharged because of age. This contention, however, is disputed by other testimony.

[3] Several officers of the banner have sworn in affidavits that Mrs. McKennon would have been discharged for such conduct, and McKennon testified at one point in her deposition that she would have been terminated for this conduct. There, then, is no substantial issue here. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2511-12, 91 L.Ed.2d 202 (1986).

and her discrimination claim.[4]

II

This court reviews the district court's grant of summary judgment *de novo*, making all reasonable inferences in favor of the non-moving party. *EEOC v. University of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

III

We first address in this case the question whether the district court erred in granting summary judgment for the nashville Banner based on after-acquired, undisputed evidence of Mrs. McKennon's misconduct in copying and removing confidential files and that she would have been discharged for such conduct. More specifically, the issue is whether the after-acquired evidence doctrine applies exclusively to cases of employment application fraud or whether it also applies, as here, to cases of employee misconduct during employment.

The seminal case establishing the after-acquired evidence doctrine in employment discrimination cases is *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988). The doctrine mandates judgment as a matter of law for an employer charged with discrimination if evidence of the plaintiff employee's misconduct surfaces at some time after the termination of the employee, and the employer can prove it would have fired the employee on the

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[4] As we understand the appellant's "nexus" argument, it is that her improper taking of the records cannot be a basis for a denial of her claim under the ADEA because she took the records to give her a basis to contest her expected discharge because of her age.

basis of the misconduct if it had known of it. In *Summers*, the employee claimed he was fired on the basis of his age and race, in violation of the ADEA and Title VII. Four years after the discharge, while preparing for trial, the employer discovered evidence that the employee falsified records in 150 instances.[5] The Tenth Circuit affirmed summary judgment for the employer, reasoning that while the after-acquired evidence could not have been the actual cause of the employee's discharge, it was relevant and determinative as to the employee's claim of injury, and precluded the grant of any relief or remedy. *Id.* at 708.

This circuit adopted the Summers after-acquired evidence rule in *Johnson v. Honeywell Info. Sys. Inc.*, 955 F.2d 409 (6th Cir. 1992), a diversity action under Michigan law. In *Johnson*, the plaintiff sued her former employer alleging that she was discharged in violation of Michigan's Elliott-Larsen Civil Rights Act. During discovery, the employer learned that the plaintiff had misrepresented her educational background on her employment application, for example, claiming to have a bachelor's degree when in fact she did not. The court held that:

> on these facts, even if we assume that Honeywell discharged Johnson in retaliation for her opposition to violations of the Act, she is not entitled to relief. Because Honeywell established that it would not have hired Johnson and that it would have fired her had it become aware of her resume fraud during her employment, Johnson is entitled to no relief, even if she could prove a violation of Elliott-Larsen.

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[5] The employer was also aware *during* Summer's employment that he had falsified some company records. The company placed him on probationary status for two weeks and warned him never again to falsify company records, but he did not heed that advice. 864 F.2d at 702.

Id. at 415. The *Johnson* court noted, however, that evidence of an employee's resume fraud "must establish valid and legitimate reasons for the termination of employment." *Id.* at 414.

We reiterated our commitment to the *Summers* after-acquired evidence rule in *Milligan-Jensen v. Michigan Technological Univ.* 975 F.2d 302 (6th Cir. 1992), *cert. granted*, __ U.S. __, 113 S.Ct. 2991, 125 L.Ed.2d 686, *cert. dismissed*, __ U.S. __, 114 S.Ct. 22, 125 L.Ed.2d 773 (1993). In *Milligan-Jensen*, the plaintiff produced evidence that her employer violated Title VII by discriminating against her on the basis of her sex. After the employee's discharge, however, the defendant discovered the employee had omitted a DUI conviction from her employment application. We held that this omission was material and explained that because the plaintiff's falsification, "if discovered during her employment, would have resulted in [her] termination, it becomes irrelevant whether or not she was discriminated against...." *Id.* at 305. The Supreme Court granted *certiorari* to review this case, but dismissed it after the parties settled. Thus, in *Johnson* and *Milligan-Jensen*, we have firmly endorsed the principle that after-acquired evidence is a complete bar to any recovery by the former employee where the employer can show it would have fired the employee on the basis of the evidence.[6]

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[6] *See also Paglio v. Chagrin Valley Hunt Club Corp.*, 966 F.2d 1453, 1453 (6th Cir. 1992) (unpublished) ("even if the Club was motivated to discharge Paglio because of his age, the misuse of Club funds discovered after Paglio's retirement provided an independent basis for termination."); *Dotson v. United States Postal Serv.*, 977 F.2d 976, 978 (6th Cir.), *cert. denied*, __ U.S. __, 113 S.Ct. 263, 121 L.Ed.2d 193 (1992) ("Even though plaintiff's failure to complete the application truthfully was discovered post-termination, he is not entitled to handicap discrimination relief when he was not initially qualified for the position."); *Baab v. AMR Services Corp.*, 811 F.Supp. 1246 (N.D. Ohio 1993) (interpreting Ohio law and holding former

(continued...)

Moreover, the *Summers* case, from which this circuit adopted the after-acquired evidence rule, did not involve resume fraud, but like this case involved evidence of employee misconduct. In *Summers*, the plaintiff falsified company records more than 150 times. 864 F.2d at 703

Finally, we agree with a district court which recently applied the after-acquired evidence doctrine in a factually similar situation. *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F.Supp. 1466 (D. Ariz. 1992). In *O'Day*, a former employee who alleged he was discriminated against under the ADEA surreptitiously removed his confidential personnel file, photocopied portions of the file, and showed some of the material to a co-worker. *Id.* at 1467. The court noted that the issue of whether an employer would actually fire an employee for misconduct could generate a genuine issue of material fact in some cases. Citing an employee handbook and an affidavit by a company official indicating that the plaintiff would have been immediately fired for his conduct, however, the court determined there was no question the employer would have fired the plaintiff and the employer was therefore entitled to summary judgment. *Id.*

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[6](...continued)

employee's state discriminatory discharge claims were barred by after-acquired evidence of employee's misstatements on employment application); *Bray v. Forest Pharmaceuticals, Inc.*, 812 F.Supp. 115, 117 (S.D. Ohio 1993) ("as the Defendant has shown that the misrepresentations or omissions [on former employee's application] were material, were relied upon by the employer in making its decisions, and are clearly directly related to measuring the candidate for this type of employment, the post-discharge discovery of falsification renders summary judgment appropriate in this case."); and *Benson v. Quanex Corp.*, 1992 WL 63013 (E.D. Mich. 1992) (unpublished) (granting summary judgment to employer in racial harassment and constructive discharge action under Michigan Elliott-Larsen Civil Rights Act because the employer showed it would not have hired the employee had it known of the employee's prior felony conviction and incarceration).

at 1468-70. Similarly, statements of the Banner officials that McKennon would have been fired had the newspaper known she had removed confidential documents support summary judgment in favor of the Banner.

IV

We next turn to whether the after-acquired evidence doctrine applies to cases where there is an alleged nexus between the employee's misconduct and the discrimination claim. Mrs. McKennon claims she copied and removed the confidential documents only because she feared for her job and thus her conduct was justified. We thus understand her contention to be that, if the Banner should discharge her, she would have a lever with which to resist that action. We find that such an alleged nexus is irrelevant to the application of the after-acquired evidence doctrine.[7] The

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[7] Of course, if the employee's "misconduct" falls into the category of protected activities set forth in the "opposition clause" to the ADEA, 29 U.S.C. § 623(d), the employer could not avoid liability for discriminatory actions based upon the employee's conduct. Under § 623(d),

> Opposition to unlawful practices; participation in investigations, proceedings, or litigation
>
> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment ... because such individual ... has opposed any practice made unlawful by this section, or because such individual ... has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

See Jeffries v. Harris County Community Action Ass'n, 615 F.2d 1025 (5th Cir. 1980) (holding plaintiff employee's copying of confidential documents interfered with the employer's interest in maintaining the confidentiality of employee records, and thus was not protected conduct); and *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F.Supp. 1466, 1470 (D. Ariz. 1992) (holding "no reasonable jury (continued...)

sole issue in after-acquired evidence cases is whether the employer would have fired the plaintiff employee on the basis of the misconduct had it known of the misconduct. *See Milligan-Jensen*, 975 F.2d at 304-305.[8]

V

For the aforementioned reasons, we AFFIRM the district court's grant of summary judgment for the defendant.

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[7](...continued)

would find that O'Day's conduct, surreptitiously removing confidential management files from his supervisor's desk, photocopying them, and showing the file to a co-worker, was reasonable in light of the circumstances."). Copying and removing confidential documents is clearly not protected conduct.

[8] We note, incidentally, that if Mrs. McKennon's nexus theory were adopted, it would apply where an employee takes money from her employer for support of herself in anticipation of an unlawful discharge.

No. 3-91-0346

United States District Court
M.D. Tennessee
Nashville Division

CHRISTINE McKENNON,

v.

THE NASHVILLE BANNER PUBLISHING COMPANY.

Decided June 3, 1992

MEMORANDUM

HIGGINS, District Judge.

The Court has before it the motion for summary judgment of the defendant, Nashville Banner Publishing Co., Inc. (filed January 7, 1992; Docket Entry No. 7), and the response thereto by the plaintiff Christine McKennon (filed March 16, 1992; Docket Entry No. 25). For the reasons discussed below, the Court grants the motion for summary judgment of the Banner.

I.

Mrs. McKennon was employed by the Banner in May 1951, initially as an ad taker, subsequently as a secretary for six different individuals. In each of these positions, Mrs. McKennon was evaluated and her performance was consistently rated as excellent. From February 26, 1982, until March 6, 1989, Mrs. McKennon held the position of secretary to Jack Gunter, Executive Vice President. In 1989, Mr. Gunter's job assignment changed, and Mrs McKennon was reassigned as secretary to Imogene Stoneking, Comptroller. In this position, her duties included

maintaining personnel files, working on preparation of the annual budget, maintaining petty cash vouchers for expense reimbursements, processing time sheets, making travel arrangements, directing the personnel department regarding employee changes, and other duties, including miscellaneous tasks assigned directly by Ms. Stoneking. Complaint at 3 (filed May 6, 1991; Docket Entry No. 1).

Mrs. McKennon was an employee at will. Either party could terminate the employment relationship at any time. Acknowledgement of receipt of Nashville Banner employee handbook, dated February 28, 1990, appendix A to the Banner's memorandum to support motion for summary judgment (filed January 7, 1992: Docket Entry No. 8). Mrs. McKennon's employment was terminated on October 31, 1990, at which time she was sixty-two years old. According to the Banner, its need to reduce the size of its work force led to the decision to terminate her employment. She filed this lawsuit on May 6, 1991, alleging age discrimination under the Age Discrimination in Employment At (ADEA), 29 U.S.C. § 621, *et seq.*, and the Tennessee Human Rights Act (THRA) Tenn. Code Ann. § 4-21-101 *se seq.*

During the course of Mrs. McKennon's deposition on December 18, 1991, the Banner discovered that when Mrs. McKennon was a secretary to Ms. Stoneking, she copied and removed from the Banner's premises the following confidential documents: Nashville Banner Fiscal Period Payroll Ledger dated 9/30/89; Nashville Banner Publishing Co. Inc., Profit and Loss Statement dated 10/30/89; a note from Elise to Simpkins; a memorandum from Imogene Stoneking to Irby C. Simpkins, Jr., dated 2/3/89; a handwritten note dated 2/8; and an Agreement between the Banner and one of its managing employees (notarized 3/1/89). Memorandum in support of defendant's motion for summary judgment, appendices, D, F, H (filed January 7, 1992; Docket Entry No. 8). She took them home and showed them to her husband. Defendant's statement of

undisputed facts at paras. 7-9 (filed January 7, 1992; Docket Entry No. 9). Mrs. McKennon argues that she copied and removed the documents for her "insurance" and "protection," "in an attempt to learn information regarding my job security concerns." Deposition of Christine McKennon taken December 18, 1991, at 241 (filed April 10, 1992; Docket Entry No. 39); affidavit of Christine McKennon at para. 12 (filed March 16, 1992; Docket Entry No. 28). As a result of this discovery, the Banner sent her a letter of termination on December 20, 1991. Exhibit A to appendix I of memorandum in support of defendant's motion for summary judgment.

On January 7, 1992 the Banner filed its motion for summary judgment based on the after-acquired evidence doctrine. Mrs. McKennon argues that the doctrine is inapplicable in the instant case and therefore summary judgment is improper.

II.

The Court has subject matter jurisdiction over Mrs. McKennon's ADEA claim under 28 U.S.C. § 1331, the federal question statute. The Court has pendent jurisdiction over Mrs McKennon's claim under the THRA.

A.

Summary Judgment Standard

Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The parties do not dispute the duration and nature of Mrs. McKennon's employment with the Banner; nor do they dispute that she copied and removed confidential materials from the Banner's premises without permission. There is an apparent dispute, however, about the dates Mrs. McKennon took the documents. Further, Mrs. McKennon disputes that her copying and removal of the documents constituted such misconduct that would justify the application of the after-

acquired evidence defense. She argues that her actions were justified for her own protection. She argues that those issues should be left to the jury.

None of these disputes are material to the resolution of this case. The Court finds that what is material in this case is that Mrs. McKennon's copying and removal of the confidential documents constituted misconduct, which was in violation of her obligations as a confidential secretary. The dates on which she took the documents are irrelevant as long as she took them prior to her termination. Therefore the Court holds that there are no genuine issues as to material facts.

B.

The After-Acquired Evidence Doctrine

The Banner argues that it is entitled to summary judgment on the basis of the after-acquired evidence doctrine. This doctrine was stated clearly by the Tenth Circuit in *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988). It was adopted by the Sixth Circuit in *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992).

The Banner argues that under *Summers* and *Honeywell*, Mrs. McKennon is precluded from recovery, even assuming that she had been subjected to age discrimination, since Mrs. McKennon's unauthorized copying and removal of confidential materials, if known to it at the time, would have resulted in her immediate termination. Defendant's supplemental authority in support of summary judgment at 3 (filed March 3, 1992; Docket Entry No. 17).

In *Summers*, the plaintiff alleged he was wrongfully discharged from his position as a field claims representative due to his age and religious beliefs. In preparing for trial, the defendant employer examined the plaintiff's records and discovered that he had falsified over 150 records. The Tenth

Circuit agreed with the defendant's argument, that although this after-acquired evidence might not be relevant to show why the plaintiff was discharged, it was relevant in deciding what relief, if any, was available to the plaintiff. *Summers*, 864 F.2d at 704, 708.

In *Honeywell*, the plaintiff made false statements as to her college degree, other college courses taken and her job experience when she applied for the job. The job advertisement stated that Honeywell required a college degree in order for a candidate to be eligible *Honeywell*, 955 F.2d at 411-12. The Sixth Circuit held that "under Michigan law, an employer may rely upon an employee's false representations made at the time of employment, of which the employer was unaware, and which were not the grounds for the employee's wrongful discharge, as a just cause defense to the employee's wrongful discharge and state civil rights claims." *Id.* at 410-11. The Sixth Circuit in *Honeywell* adopted the reasoning of *Summers*

> while evidence acquired by an employer during discovery regarding plaintiff's 150 falsified claims during his employment as a field claims representative could not be said to constitute the actual "cause" for plaintiff's discharge, it was relevant to his claim of "injury" and precluded the grant of any relief or remedy under the federal civil rights law.

Honeywell, 955 F.2d at 415 (citing *Summers*, 864 F.2d at 708). "To argue ... that this after-acquired evidence should be ignored is utterly unrealistic." *Honeywell*, 955 F.2d at 415 (quoting *Summers*, 864 F.2d at 708).

The Banner also has brought to the Court's attention a very recent case: *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F.Supp. 1466 (D. Ariz. 1992), which relied on *Summers* in applying the after-acquired evidence defense. *O'Day* is factually similar to the case presently before this Court. In *O'Day*, the plaintiff, approximately six weeks

before he was selected for a company-wide lay off, surreptitiously entered his supervisor's office, removed his confidential personnel file from the desk, photocopied portions of the file, removed the copied documents from the premises, and showed the documents to another individual. A week later, without any authorization, Mr. O'Day returned to his supervisor's office after his shift, copied his entire personnel file, and removed the copied documents from the premises. Mr. O'Day claimed his purpose was to gather information to prepare his charge with the EEOC. *O'Day*, 784 F.Supp. at 1467. The employer discovered Mr. O'Day's wrongdoing only when counsel deposed him in defending the age discrimination lawsuit. *Id.* at 1468. The court in *O'Day* applied the after-acquired evidence doctrine. Finding that there was "no question as to the outcome of Mr. O'Day's employment status" had his employer known of his misconduct, the court granted summary judgment to the defendant. *Id.* at 1469.

Mrs. McKennon disputes the applicability of the after-acquired evidence doctrine. In addition, she claims that her conduct was justified for her own protection. She argues that the instant case differs from *Summers* and *Honeywell*[1] in that, in those cases, the alleged misconduct concerned material misrepresentations as to the plaintiffs' qualifications whereas it is not so here.[2] The Court agrees that Mrs. McKennon's misconduct was not identical to the misconduct in those cases. However, what matters is not whether the alleged misconduct is of exactly the same pattern. The central issue is the nature and materiality of

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[1] Mrs. McKennon has not filed a response to the defendant's second supplemental authority (*i.e.*, the *O'Day* case).

[2] The court in *Summers* found "no meaningful distinction between a case involving the rejection of an application and a case involving the discharge of an employee." *Summers*, 864 F.2d at 707 n.3.

the alleged misconduct. *Cf. Honeywell*, 955 F.2d at 413. Mrs. McKennon admits that, as a confidential secretary to the managing staff of the Banner, she was obligated to not violate her duty of confidentiality. Affidavit of Imogene L. Stoneking at 1-2 (filed March 10, 1992; Docket Entry No. 24); McKennon deposition at 136, 137, 158. By copying and removing confidential materials without any authorization, she violated this duty of confidentiality.

In order to rely on the after-acquired evidence doctrine, the Banner must prove that, had it known of Mrs. McKennon's misconduct, it would have terminated her employment. *O'Day*, 784 F.Supp. at 1468.

> [T]he after-acquired evidence must establish valid and legitimate reasons for the termination of employment.... These requirements are necessary to prevent an employer from combing a discharged employee's record for evidence of any and all misrepresentations, no matter how minor or trivial, in an effort to avoid legal responsibility for an otherwise impermissible discharge.

Honeywell, 955 F.2d at 414.

In this case, the Banner has established just cause for firing Mrs. McKennon by producing undisputed evidence establishing the nature and materiality of Mrs. McKennon's misconduct. Mr. Irby C. Simpkins, Jr., President of the Banner, stated that he would have terminated her immediately had he learned of her misconduct at any time prior to her discharge from the Banner on October 31, 1990. Affidavit of Irby C. Simpkins, Jr. at para. 5, appendix I to memorandum in support of defendant's motion for summary judgment.

The Court does not hold that any or all misconduct during employment constitutes just cause for dismissal or serves as a complete defense to a wrongful discharge action. The Court concludes, however, that Mrs. McKennon's

misconduct, by virtue of its nature and materiality and when viewed in the context of her status as a confidential secretary, provides adequate and just cause for her dismissal as a matter of law, even though her misconduct was unknown to the Banner at the time of her discharge. Mrs. McKennon has brought forth no evidence tending to prove that the Banner would have continued her employment had it learned of her misconduct prior to her termination.

Mrs. McKennon next argues that this case is different from *Honeywell*, in that she established a *prima facie* case of age discrimination and that a nexus exists between her misconduct and her discrimination claim. Plaintiff's response to defendant's motion for summary judgment (filed March 16, 1992; Docket Entry No. 25). The court in *Summers*, which was adopted by the Sixth Circuit in *Honeywell*, assumed age discrimination and still found that the after-acquired evidence doctrine prohibited recovery. *Summers*, 864 F.2d at 708. The nexus argument is irrelevant for the resolution of this case. If a plaintiff has engaged in misconduct severe enough to warrant termination upon discovery by the employer, then that plaintiff has no grounds that justify recovery for her termination. Whether the misconduct is related to the plaintiff's claim is irrelevant. *Cf. Honeywell*, 955 F.2d at 414; *Summers*, 864 F.2d at 704-07.

Mrs. McKennon's argument that she copied and removed the confidential materials for her own protection must also fail. It is recognized under the ADEA that an employee may not be discharged on the basis of the "opposition clause."[3] Mrs. McKennon has not made such a

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[3] 29 U.S.C. § 623(d) provides:

> Opposition to unlawful practices; participation in investigations, proceedings, or litigation
>
> It shall be unlawful for an employer to discriminate against
>
> (continued...)

claim and her conduct does not fall into that category.

III.

CONCLUSION

For the reasons stated above, the Banner's motion for summary judgment is granted.

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[3](...continued)

any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.